

ORIGINAL

LAW OFFICES  
**LEVENTHAL, SENTER & LERMAN P.L.L.C.**

SUITE 600  
2000 K STREET, N.W.  
WASHINGTON, D.C. 20006-1809

RECEIVED

OCT 13 1998

TELEPHONE  
(202) 429-8970

TELECOPIER  
(202) 293-7783

WWW.LSL-LAW.COM

October 13, 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

WRITER'S DIRECT DIAL  
202-416-6780

WRITER'S E-MAIL  
DCORBETT@LSL-LAW.COM

NORMAN P. LEVENTHAL  
MEREDITH S. SENTER, JR.  
STEVEN ALMAN LERMAN  
RAUL R. RODRIGUEZ  
DENNIS P. CORBETT  
BRIAN M. MADDEN  
BARBARA K. GARDNER  
STEPHEN D. BARUCH  
SALLY A. BUCKMAN  
NANCY L. WOLF  
DAVID S. KEIR  
DEBORAH R. COLEMAN  
NANCY A. ORY  
WALTER P. JACOB  
LINDA D. FELDMANN  
RENÉE L. ROLAND  
ROSS G. GREENBERG  
JOHN D. POUTASSE  
MATTHEW H. BRENNER  
CHRISTOPHER J. SOVA

**VIA HAND DELIVERY**

Ms. Magalie Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Re: MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264

Dear Ms. Salas:

On behalf of Davis Television Duluth LLC, applicant for a construction permit for Channel 27 at Duluth, Minnesota, and Davis Television Topeka, LLC, applicant for a construction permit for Channel 43 at Topeka, Kansas, I am transmitting herewith an original and nine copies of their Petition for Partial Reconsideration in the above-referenced proceeding.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,



Dennis P. Corbett

DPC:kbs  
Enclosures

No. of Copies rec'd  
List ABCOE

029

ORIGINAL

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

RECEIVED

OCT 13 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Section 309(j) of the )  
Communications Act — Competitive Bidding )  
for Commercial Broadcast and Instructional )  
Television Fixed Service Licenses )

MM Docket No. 97-234

Reexamination of the Policy Statement )  
on Comparative Broadcast Hearings )

GC Docket No. 92-52

Proposals to Reform the Commission's )  
Comparative Hearings Process to Expedite )  
the Resolution of Cases )

GEN Docket No. 90-264

To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION**

Davis Television Duluth, LLC, applicant for a construction permit for a new television broadcast station to operate on Channel 27 at Duluth, Minnesota, and Davis Television Topeka, LLC, applicant for a construction permit for Channel 43 at Topeka, Kansas (collectively "Davis Duluth/Topeka"), by their attorneys and pursuant to 47 C.F.R. § 1.429, hereby seek reconsideration of the Commission's First Report and Order, FCC 98-194, released August 18, 1998 in the above captioned proceeding ("First R&O").<sup>1/</sup> In support whereof, the following is shown.

---

<sup>1/</sup> The First R&O was published in the Federal Register on September 11, 1998. This Petition is therefore timely filed. 47 C.F.R. § 1.429(d).

## **I. Background**

In their January 26, 1998 Comments in this proceeding, Davis Duluth/Topeka<sup>2/</sup> strongly urged the Commission to immediately process and grant their applications, which were the only applications for Channel 27, Duluth and Channel 43, Topeka, respectively, filed by the September 20, 1996 deadline established by the FCC's Sixth Further Notice of Proposed Rule Making, MM Docket No. 87-268, 11 FCC Rcd 10968 (1996) ("Sixth Further Notice"). Davis Duluth/Topeka set forth multiple reasons why the Commission should not open another filing window for competing applications for these two allotments and then subject that newly created applicant pool to the new auction procedures. Those reasons include:

- The publicly announced September 20, 1996 filing deadline constituted "a filing window" within the meaning of the Conference Report which accompanied the Balanced Budget Act of 1997 and the FCC is under no obligation to open another window.
- The lack of interest or foresight on the part of "potential" applicants for these frequencies should not work a penalty on Davis Duluth/Topeka. If Davis Duluth/Topeka had not filed their applications, the Duluth and Topeka allotments would have been permanently deleted, and parties who failed to file by September 20, 1996 were obviously willing to let that happen.
- Under well established equitable principles (Melody Music, Inc. v. FCC, 345 F.2d 730), Davis Duluth/Topeka should not be treated any differently than applicants who happened to find themselves subject to competing applications filed by the September 20, 1996 deadline.

---

<sup>2/</sup> The commenting group included a third Davis Television entity — Davis Television Wausau, LLC — which has since dismissed its application for Channel 33 at Wausau, Wisconsin.

The Commission, however, rejected Davis Duluth/Topeka's request in the First R&O and ruled that competing applications would be solicited for Duluth and Topeka and auctions employed if competing applications were in fact filed.

**II. The First R&O Inadequately Addresses The Arguments Favoring Immediate Processing And Grant Of Davis Duluth/Topeka's Singleton Applications**

The crux of both Davis Duluth/Topeka's earlier Comments and this Petition is that the unique circumstances which attended the September 20, 1996 filing deadline justify the immediate processing and grant of the two singleton applications at issue here without new applications being solicited and auctions held. Although the First R&O denied this requested relief, it did so without adequately addressing Davis Duluth/Topeka's arguments.

On the singleton issue, the First R&O concludes that in the absence of a statutory provision directly on point, it is "appropriate to look to the legislative history to determine what Congress intended with regard to singleton applications." First R&O at ¶ 65. Under that legislative history, in turn, the key to determining whether singletons can be granted without auction is whether the "Commission has yet to open a filing window" with respect to the singleton in question. Id. (quoting Conference Report at 573-74) (emphasis added). The Commission also found in the First R&O that "[w]here the filing windows or cut-off-lists have closed. . . , we agree that it is appropriate to grant pending singleton applications." First R&O at ¶ 65 (emphasis added) (footnote omitted).

Against this background, the First R&O attempts to explain why the September 20, 1996 filing deadline did not close such a filing "window" or filing period. The Commission finds that the "intent of that 30-day period [ending September 20, 1996] was to

afford an opportunity to file any applications that were currently being prepared for filing, not to solicit competing applications.” First R&O at ¶ 70.<sup>3/</sup> In Davis Duluth/Topeka’s view, however, the August 14-September 20, 1996 period was in fact just such a window, one that was publicly announced and then firmly closed, resulting in the deletion of any vacant NTSC allotment for which one or more applications was not filed. Despite the Commission’s professed “intent” to assist only those who were already preparing NTSC applications, this filing opportunity was not limited to those able to demonstrate that they were in the process of preparing such applications. There was adequate time to commence and complete an application between August 14, 1996 and September 20, 1996. While it is true that no “second chance” window has ever opened during which parties who failed to file during August-September 1996 can now “get in the game,” the Conference Report, as quoted above, does not speak of the need for multiple filing windows, but only of whether the FCC has opened “a [singular] filing window” (emphasis added). It is therefore arbitrary to conclude that there has never been a “filing period or window” for Duluth Channel 27 or Topeka Channel 43. Davis Duluth/Topeka lived through that filing period/window, which had two key characteristics — a publicized deadline for filing (September 20, 1996) and potentially draconian consequences for the failure to file (i.e., deletion of a vacant allotment).<sup>4/</sup>

---

<sup>3/</sup> The filing “opportunity” as it was called in the Sixth Further Notice lasted for 37, not 30 days. It was announced with the release of the Sixth Further Notice on August 14, 1996 and extended until 30 days after Federal Register publication, or until September 20, 1996.

<sup>4/</sup> This situation contrasts sharply with the way in which applications were filed for vacant allotments before the Sixth Further Notice established the August 14- September 20, 1996 filing window. Previously, there was no public invitation to file and no “window” created until a cut-off deadline was established by public notice.

Importantly, there is additional statutory support for Davis Duluth/Topeka's position on the singleton issue. 47 U.S.C. § 309(j)(6)(E), which applies generally to the FCC's use of competitive bidding, provides that nothing in Section 309(j) or in "the use of competitive bidding shall — be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings" (emphasis added). In the First R&O, the Commission cited Section 309(j) as the most relevant statutory provision on the singleton issue, but concluded that it was "silent on this question," leading the FCC to consult the legislative history. First R&O at ¶ 65. But Section 309(j)(6)(E) provides cogent support for avoiding unnecessary competitive bidding. Similarly, 47 U.S.C. § 309(j)(7) does not allow the FCC to use an auction's revenue-generating potential as a public interest justification for throwing a singleton application into auction. These provisions both militate strongly against the First R&O's conclusion that the analog singleton applications should be subjected to a new filing window and potential auction.

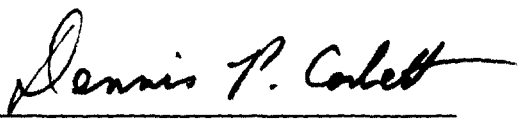
## **II. Conclusion**

In sum, the Commission should reconsider its decision to hold auctions for singleton applications filed in response to the September 20, 1996 filing deadline. Such applications should be accepted for filing by public notice, processed expeditiously, and granted without further delay. Such a course of action would be fully consistent with the legislative history of the Balanced Budget Act of 1997, and clearly serve the public interest by hastening the provision of new television service to the public. This is a particularly worthy goal where the digital conversion process is underway and the viewing public in the markets for which Davis

Duluth/Topeka has applied will substantially benefit from the introduction of new competition and service as rapidly as possible.

Respectfully submitted,

**DAVIS TELEVISION DULUTH, LLC**  
**DAVIS TELEVISION TOPEKA, LLC**

By: 

Dennis P. Corbett  
Ross G. Greenberg

Leventhal, Senter & Lerman P.L.L.C.  
2000 K Street, NW  
Suite 600  
Washington, D.C. 20006

October 13, 1998

Their Attorneys